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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM RUSSELL MERLEN,

Defendant and Appellant.

C051678

(Super. Ct. No. 05F4552)

Following a jury trial, defendant William Russell Merlen was found guilty of gross vehicular manslaughter while intoxicated.¹ (Pen. Code, § 191.5, subd. (a) [hereafter section 191.5(a)].) The trial court found true defendant's prior conviction for driving under the influence causing injury. Probation was denied and defendant was sentenced to state prison for a term of 15 years to life.

On appeal, defendant contends the police officer who testified at trial that defendant had been driving under the

¹ On the date of the incident, defendant was identified as "William Russell Corlett."

influence of a drug was not qualified to rely on the toxicology report in rendering his opinion. He also claims there was insufficient evidence that he was under the influence of a drug for purposes of section 191.5(a). Finding no merit in these contentions, we shall affirm.

FACTUAL BACKGROUND

On July 19, 2004, at approximately 9:20 a.m., defendant drove his pickup truck across double yellow lines into the oncoming lane, causing a head-on collision that resulted in the death of James DeWitt, the driver of the other vehicle.

According to the driver of a vehicle behind defendant before the accident, defendant's truck crossed the double yellow lines twice prior to the collision such that it was entirely on the wrong side of the road. On these occasions, the truck slowly reentered the correct lane.

Redding Police Officer Bruce Bonner, who had 28 years of training and experience in recognizing symptoms of drug use and investigating incidents of driving under the influence of drugs, contacted defendant briefly at the scene of the collision. He noted that defendant, who had suffered injuries from the accident, appeared dazed, his speech was "very slow and deliberate" and his eyes were bloodshot. In addition, prescription bottles for Ambien (a sleeping pill) and Wellbutrin (an antidepressant) in defendant's name were located in his vehicle. Officer Bonner was "suspicious" that defendant may have been under the influence of drugs based on his observations

of defendant and the statements regarding his driving. He mentioned this to another officer at the scene and suggested that defendant be tested.

Shortly before the accident, defendant was discovered by his half brother lying down next to the front door of his home. Defendant told him that he needed a place to stay because someone was after him, but he was unable to provide a reasonable explanation why he was being pursued. Defendant's speech was very slow and somewhat slurred, his eyes were red and he was walking slower than normally. He said he was drowsy from taking antihistamines for allergies. Defendant had been at his half brother's home the previous night for approximately an hour and had looked tired and "maybe a little out of it."

Defendant's blood was drawn approximately two hours after the accident and was found to contain Ambien and low levels of Wellbutrin and methamphetamine.²

Defendant was interviewed by another police officer at the hospital approximately two and a half hours after the accident, at which time he was coherent and able to carry on a conversation. However, defendant was not able to explain how the accident occurred, stating, "[I] was driving down the road one minute . . . and the next minute [I] was in an accident." When asked when he had last taken Ambien, defendant said he "had

² Morphine, which was given to defendant by paramedics after the accident, was also found in his system.

taken a few around 9:00 [a.m.]" When the officer asked defendant why he took sleeping medication before driving, defendant said, "[I] must not have taken that" and that he thought he had taken one of his other medications.

The officer who interviewed defendant at the hospital contacted him by phone approximately four months after the accident to inquire about the presence of methamphetamine in his blood. Defendant denied he had used methamphetamine and conjectured that maybe his roommate had put some of the drug in his orange juice.

Daniel Coleman, a forensic toxicologist, testified that Ambien is a "very strong depressant" that is rapidly eliminated from the body and does not build up over time.³ According to the manufacturer of Ambien, it remains in the system for eight hours. The window of detection of Ambien is "very limited" and "[t]he effects of the drug are very strong through that whole window." The observable effects of Ambien include drowsiness, poor coordination, poor judgment and slurred speech.

Coleman testified that the amount of Ambien in defendant's system was not quantified because the quality controls necessary to quantitate results are not commercially available for the drug. However, the testing did not indicate an "abusive level" of the drug. According to Coleman, the presence of Ambien in

³ At times during his testimony, Coleman used the generic name for Ambien, which is Zolpidem.

defendant's blood reflected recent usage, and the fact that the accident occurred an appreciable period of time before defendant's blood was drawn rendered it more likely that defendant was feeling the effects of the drug when the accident occurred. With regard to the methamphetamine in defendant's system, the amount was consistent with a small recent dosage or a less recent larger dosage. According to Coleman, paranoia--including "[t]he feeling that someone's out to get [you]"--is a common side effect of methamphetamine use. In addition, an individual "coming down off methamphetamine" can experience drowsiness or fatigue.

Coleman testified he generally would not make a determination as to whether an individual was under the influence based on toxicology results alone. In almost all cases, it is necessary also to look at other information, such as "signs and symptoms, witness observations [and] observations by the officer." Defendant's driving pattern before the accident, as well as his slow speech and movement and his tiredness, were consistent with being under the influence of Ambien. It was Coleman's opinion that defendant was "under the influence" and "feeling the effects" of Ambien and/or methamphetamine, although Coleman was not able to render an opinion as to the extent of defendant's impairment from those substances. However, based on the fact that defendant drove his vehicle into oncoming traffic, Coleman thought it was "pretty clear . . . he was impaired and not driving safely."

Officer Bonner testified it was his opinion that defendant was operating a vehicle under the influence of a central nervous system depressant. His opinion was based on his observations of defendant after the accident, the statements of witnesses regarding defendant's condition and driving before the accident, the manner in which the accident occurred, defendant's statements regarding the medication he had taken and the toxicology report.

DISCUSSION

I

Defendant contends Officer Bonner was not qualified to rely on the toxicology report in rendering his opinion that defendant was driving under the influence. We disagree.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) An expert witness may base an opinion "on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subd. (b).) "Where the witness discloses special knowledge of the subject on which he undertakes to give his opinion as an expert, the question of the

degree of his knowledge goes to the weight of his testimony rather than to its admissibility." (*People v. Smith* (1967) 253 Cal.App.2d 711, 718 (*Smith*).)

"The qualification of a person to testify as an expert witness is a matter within the sound discretion of the trial court; and its determination, in the absence of a clear abuse, will not be disturbed by a reviewing court." (*Smith, supra*, 253 Cal.App.2d at p. 718.) "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness ``clearly lacks qualification as an expert.''" (*People v. Farnam* (2002) 28 Cal.4th 107, 162.)

In the present matter, a voir dire of Officer Bonner was conducted outside the presence of the jury after defendant challenged his qualifications to testify as an expert on whether defendant was driving under the influence.

Officer Bonner testified that he began specializing "in the field of people being under the influence of controlled substances" in 1978 when he was in the United States Air Force and that he had been involved in drug investigations "ever since." He had received over 700 hours of training related to the use and sales of drugs, including a six-hour course addressing the recognition of symptoms and effects of a combination of illegal drugs and prescription drugs.

According to Officer Bonner, he had spoken with the doctor who taught this course about the effects of Ambien combined with methamphetamine and other drugs and had consulted with two

pharmacists on the subject, as well as conducting research on the Internet. Officer Bonner had been told by drug addicts over the years that drugs such as Ambien are used "to take the edge off" methamphetamine. He testified that symptoms of Ambien use include "slowed speech," "slowed central nervous system signs" and "slowed reflexes."

Officer Bonner acknowledged he was not qualified to testify about defendant's ability to drive based only on the toxicology results for Ambien. However, based on the reports, the witness statements and the officer's personal knowledge of the effects of various substances, in addition to the toxicology results, it was his opinion that defendant was under the influence of substances that impaired his ability to drive.

The trial court ruled that Officer Bonner was qualified to testify as an expert regarding his opinion that defendant was under the influence of a drug based on his observations of defendant and evidence from other witnesses that would be presented at trial, including the toxicology report. The court precluded the officer from rendering an expert opinion that defendant was under the influence of Ambien. However, after Officer Bonner testified further at trial regarding his qualifications, the court expanded its ruling to allow the officer to testify to his opinion that defendant was under the influence of a central nervous system depressant.

The trial court's ruling evinces no abuse of discretion. Whether a defendant was under the influence of drugs is a proper

subject of expert testimony, and such testimony may be given by a police officer who has sufficient qualifications. (*Smith, supra*, 253 Cal.App.2d at pp. 717-718; *People v. Gurrola* (1963) 218 Cal.App.2d 349, 353.) Officer Bonner had close to 30 years of training and experience investigating individuals suspected of being under the influence of controlled substances. His training had included "many hours" devoted to central nervous system depressants, and he had field experience arresting individuals for driving under the influence of depressants. The trial court acted within its discretion in finding the officer qualified to offer an opinion as to whether defendant had been driving under the influence of a central nervous system depressant.

Defendant maintains Officer Bonner was unqualified to rely on the toxicology report in rendering his opinion because "[h]e had no formal medical education."⁴ He relies on *People v. Williams* (1992) 3 Cal.App.4th 1326 to support this assertion.

⁴ Defendant offered several other bases as to why the officer was not qualified to rely on the toxicology report: (1) the officer's "opinion conflicted with the actual expert opinion of . . . Coleman"; (2) he "acknowledged that many unknown variables determined the affect [*sic*] of Ambien"; (3) he had never conducted a sobriety test on an individual suspected of using Ambien; and (4) "he did not know that methamphetamine has therapeutic uses or that a small amount of methamphetamine actually improves one's driving skills." To the extent these factors are relevant to the officer's expertise, they bear on the weight to be given his testimony, not its admissibility. (See *Smith, supra*, 253 Cal.App.2d at p. 718 [degree of knowledge of witness with special knowledge on a subject goes to weight of testimony rather than admissibility].)

Williams addressed the admissibility of a police officer's opinion that a defendant was driving under the influence of alcohol based in part on his administering of a horizontal gaze nystagmus (involuntary eye movement) test. The appellate court in that case concluded that the officer lacked sufficient expertise to attribute the results of the test to a particular cause because such testimony "rest[ed] on scientific premises well beyond his knowledge, training, or education." (*Id.* at p. 1334.) Consequently, the court held that the officer's testimony regarding the test should have been excluded.⁵

Contrary to defendant's contention, there is little similarity between the officer's reliance on a horizontal gaze nystagmus test in *Williams* and Officer Bonner's reliance here on the toxicology results. Establishing that the results of a horizontal gaze nystagmus test are significant in determining whether an individual is under the influence of alcohol requires foundational evidence not at issue in the present matter. Unlike the circumstances in *Williams*, it was not necessary for Officer Bonner to interpret or evaluate the toxicology report. Officer Bonner needed no specialized medical or scientific

⁵ Subsequent to *Williams*, the California Supreme Court held that the horizontal gaze nystagmus test was subject to proof of general acceptance by the scientific community under a "Kelly-Frye" analysis (see *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C.Cir. 1923) 293 Fed. 1013), and that, if such proof was presented, a police officer's evaluation of the test would be admissible without further expert testimony. (*People v. Leahy* (1994) 8 Cal.4th 587, 604, 611.)

knowledge to infer, based on the results of the toxicology report, that defendant had various drugs in his system.

Officer Bonner did not render a "scientific opinion" about the significance of the amounts of Ambien found in defendant's system or testify that the results of the toxicology report "showed that [defendant] was under the influence," as asserted by defendant. He merely relied on the fact that there were various substances in defendant's system, combined with other information he acquired regarding defendant's condition and driving at or near the time of the accident, to form an opinion regarding defendant's state of sobriety. Defendant asserts that Officer Bonner's testimony established he would not have been able to render the opinion that defendant was under the influence of a drug without the toxicology results. Even if we assume this assertion is accurate, we conclude that the officer properly could rely on the fact that there were drugs in defendant's system to confirm his suspicions regarding defendant's impairment.

We are bound to uphold a trial court's determination regarding a witness's qualification to testify as an expert unless a clear absence of qualification is manifest. Officer Bonner's qualifications to testify as an expert on determining whether an individual is under the influence of controlled substances were more than sufficient. As an expert on this subject, he was entitled to rely on the toxicology results in

the manner he did as a factor in forming his opinion. (See Evid. Code, § 801, subd. (b).)

II

Defendant next asserts there was insufficient evidence to establish he was under the influence of a drug for purposes of section 191.5(a). Again, we disagree.

In reviewing the sufficiency of the evidence, "we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387.) If the evidence is sufficient on each element, "the possibility that the trier of fact might reasonably have reached a different conclusion does not warrant reversal." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 639.)

Turning to the present matter, we conclude there was ample evidence that defendant was under the influence of a drug when the accident occurred. While at the scene of the accident, Officer Bonner became suspicious that defendant was under the influence of a drug based on defendant's slow and deliberate speech, his bloodshot eyes and dazed appearance, and the

presence of prescription bottles for Ambien and Wellbutrin in his truck, as well as a witness's description of his erratic driving pattern before the accident. Defendant's half brother testified that defendant exhibited similar physical symptoms shortly before the accident, resolving the question of whether defendant's physical condition was caused by the accident.

Approximately two hours after the accident, defendant tested positive for Ambien, a drug that remains in the body for only a short time and has a very strong effect on the user while it is in the system. Defendant admitted taking Ambien before the accident, although he retracted his admission when asked why he took sleeping medication before driving. According to the toxicologist who testified at the trial, defendant's driving pattern before the accident, as well as his slow speech and movement and his tiredness, were consistent with being under the influence of Ambien. Both the toxicologist and Officer Bonner rendered opinions that defendant was impaired at the time of the accident.

Defendant claims "[t]he observable circumstantial evidence that was related by all the people who observed [his] condition that morning indicated that he was not under the influence" and that the toxicology report did not establish he was under the influence of a drug. We disagree that the evidence regarding defendant's condition indicated he was not under the influence. Defendant would have us view each piece of evidence in a vacuum, rather than "'in light of the record as a whole'" (*People v.*

Carpenter, supra, 15 Cal.4th at p. 387), as we are required to do when reviewing the sufficiency of the evidence. While each piece of evidence, considered separately, could have supported an innocent explanation for defendant's condition, the evidence taken as a whole was more than sufficient to establish that defendant was under the influence of a drug at the time of the accident.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.